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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 19 70

NO. [redacted] 185

DEANE HILL COUNTRY CLUB, INC.,
A CORPORATION,
Petitioner,

v.

GEORGE P. SHULTZ, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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CITATIONS

Case:

Maryland v. Wirtz,
392 U.S. 183, 88 S. Ct. 2017 (1968) 7

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Deane Hill Country Club, Inc., a corporation, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this cause April 17, 1970.

OPINION BELOW

The opinion of the United States District Court appears on pages 18 to 31 of the Appendix to Brief of Defendant-Appellant filed in the United States Court of Appeals for the Sixth Circuit.

The judgment of the United States Court of Appeals for the Sixth Circuit is annexed hereto as an appendix on page A1.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered April 17, 1970. Jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

(1) DID THE DISTRICT COURT AND THE COURT OF APPEALS FOR THE SIXTH CIRCUIT ERR IN HOLDING THAT PETITIONER IS AN "ENTERPRISE" WITHIN THE MEANING OF SECTION 3(r) OF THE FAIR LABOR STANDARDS ACT OF 1938, AS AMENDED, (29 U.S.C. 203(r)), SO AS TO MAKE IT SUBJECT TO THE WAGE PROVISIONS OF SAID ACT?

(2) DID THE DISTRICT COURT AND THE COURT OF APPEALS FOR THE SIXTH CIRCUIT ERR IN REFUSING TO HOLD THAT PETITIONER WAS NOT LIABLE FOR FAILURE TO PAY MINIMUM WAGES AND OVERTIME COMPENSATION BY REASON OF THE PORTAL-TO-PORTAL ACT OF 1947 (29 U.S.C. 259)?

CONSTITUTIONAL PROVISION INVOLVED

Article I, Section 8 of the Constitution of the United States, insofar as pertinent:

"*Powers of Congress*.—[1.] The congress shall have power ...

[3.] To regulate commerce ... among the several states, ..."

STATUTES INVOLVED

The following statutes are involved:

Title 29, U.S.C., Sections 203(r) and 259.

STATEMENT

Petitioner is a private country club with a select membership and this was averred in the complaint. Respondent brought suit to enjoin petitioner from violating Sections 15(a)(2) and 15(a)(5), Fair Labor Standards Act of 1938, as amended, (29 U.S.C. 215(a)(2) and (5)) and alleging underpayment of minimum wages and overtime compensation to its employees.

The complaint contends petitioner is an "enterprise" as that term is used in the above provisions, and that petitioner's annual gross volume of business was not less than $500,000 from February 1, 1967 to February 1, 1969, and not less than $250,000 from February 1, 1969 to the date of the filing of the complaint, and for this reason petitioner met the test of an "enterprise" as defined in 29 U.S.C. 203(s)(1) of said Act.

Petitioner denied it was covered by said Act, and averred it is the ultimate consumer of all articles purchased; that all goods, chattels and other articles purchased by it, with the exception of approximately $5,000, had lost their interstate character at the time of their delivery to petitioner; that it was not an "enterprise" as defined by said Act; that it manufactures no goods, wares, products or merchandise shipped either in intrastate or interstate commerce; it manufactures nothing; it only converts raw materials, such as meats, vegetables and condiments incident thereto, into edible food which is sold to its private club members; it did not have an annual gross volume of sales and did not do business as an "enterprise" from February 1, 1967 of not less than $500,000 nor less than $250,000 beginning February 1, 1969 to the date of filing of the complaint; it is not a retail or service establishment open to the general public and, therefore, was exempt under said Act; it is a private establishment to serve "its select membership" and, therefore, is exempt from the provisions of said Act under Section 779.319 Interpretative Bulletin, Title 29, Part 779 of the Code of Federal Regulations which is contained in WHPC Publication 1133 of the U. S. Department of Labor, which provides, on page 50:

> "... Generally, however, an establishment, wherever located, will not be considered a retail or service establishment within the meaning of the Act, if it is not ordinarily available to the general consuming public ..."

Petitioner plead further that it relied upon said Interpretative Bulletin and, if it should be construed to be in interstate commerce, it was not subject to the Act or liable for wages under the Act by reason of the Portal-to-Portal Act of 1947, (29 U.S.C. 259), pertinent portion of which provides:

"§ 259. RELIANCE IN FUTURE ON ADMINISTRATIVE RULINGS, ETC. —

"(a) In any action or proceeding based on any act or omission on or after May 14, 1947, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation of the agency of the United States specified in subsection (b) of this section, or any administrative practice or enforcement policy of such agency with respect to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.

"(b) The agency referred to in subsection (2) shall be —

"(1) in the case of the Fair Labor Standards Act of 1938, as amended — the Administrator of the Wage and Hour Division of the Department of Labor; . . ."

The District Court sustained all the contentions of respondent and petitioner was ordered to pay $5,444.19 into the Court for distribution to certain employees of petitioner, if found, and if not found the residue to be paid into the Treasury of the United States.

The United States Court of Appeals for the Sixth Circuit, on April 17, 1970, entered a simple order, citing no law, affirming the District Court "for the reasons set forth in the memorandum opinion" filed by the District Court.

SPECIFICATIONS OF ERRORS TO BE URGED

(1) The United States Court of Appeals for the Sixth Circuit erred in holding that petitioner was an "enterprise" within the meaning of Section 3(r) of the Fair Labor Standards Act and liable for wages under said Act.

(2) The United States Court of Appeals for the Sixth Circuit erred in refusing to hold that petitioner was not liable for said wages by reason of the Portal-to-Portal Act of 1947, (29 U.S.C. 259).

REASONS FOR GRANTING THE WRIT

Petitioner is a legitimate private country club with 450 golfing members and 1000 social members and their families, making a total membership of over 3,000. The effect of the decision in the Courts below has been to deny the existence, insofar as petitioner is concerned, of "intrastate" commerce, and to hold that its every activity is "interstate" commerce. The decision in effect abolishes "intrastate" commerce.

This is a case of first impression. No private country club prior to this decision has been held to be engaged in interstate commerce so as to make the act in question applicable. The decision in this case, if allowed to stand, will affect every private country club in the United States; not only insofar as the Fair Labor Standards Act is concerned, but any other provision of law involving inter-

state commerce. The decision is far reaching and involves a substantial question of law that should be decided by this Court.

The decision is contrary to all pre-existing law as to the distinction between intrastate and interstate commerce. Admittedly, petitioner manufactures nothing and everything purchased by it, with the exception of some $5,000 in merchandise, had come to rest within the State of Tennessee and was then in the hands of a dealer and was then purchased by order of the petitioner from such dealer.

Under the decision in this case once an article is in interstate commerce it can never again enter intrastate commerce.

Furthermore, it is undisputed in this case that petitioner relied in good faith upon the provisions of the Portal-to-Portal Act of 1947, which was a complete defense and a bar to this action, and no judgment should have been entered in favor of respondent in this case by reason thereof.

In *Maryland v. Wirtz*, 392 U.S. 183, 88 S. Ct. 2017, (1968), the Court deals with the term "enterprise concept", defining the term which we submit can in no wise apply to the activities of petitioner because petitioner has no employees engaged in commerce or in the production of goods for commerce, either intrastate or interstate. This Court there stated that the effect of the 1961 change was to extend protection to fellow employees of any employee who would have been protected in the original Act, but not to enlarge the class of employers subject to the Act. In other words, no additional employers were added by the 1961 amendment. Prior to the 1961 amendment, petitioner as a retail and service establishment, not serving the general public was exempt, and the 1961

amendment as ruled by this Court did not change that exemption.

CONCLUSION

For the foregoing reasons this petition for writ of certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner.

NO. 20,101

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GEORGE P. SHULTZ Plaintiff-Appellee v. DEANE HILL COUNTRY CLUB, INC. Defendant-Appellant	ORDER

ORDER

Before: PECK, COMBS and BROOKS, Circuit Judges.

This cause coming on to be considered on the record on appeal, the briefs of the parties and the oral arguments of counsel, the Court concludes that the District Court's resolutions of the issues presented was correct and that no error intervened in the proceedings, and therefore,

IT IS ORDERED that the judgment of the District Court be and it hereby is affirmed for the reasons set forth in the memorandum opinion filed by Judge Robert L. Taylor.

ENTERED BY ORDER OF THE COURT

/s/ Carl W. Reuss
Clerk

April 17, 1970